In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-985

GEVYN CONSTRUCTION CORP.
PETITIONER,

v.

LIMBACH COMPANY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

CORNELIUS J. MOYNIHAN, JR.
PEABODY, BROWN, ROWLEY & STOREY
One Boston Place
Boston, Massachusetts 02108
Tel. No. (617) 723-8700
Counsel for Petitioner

Of Counsel:
LESLIE A. HYNES
HYNES & DIAMOND
25 Broadway
New York, N. Y. 1004

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner, GEVYN CONSTRUCTION CORP., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit rendered in these proceedings on October 20, 1976.

Opinions Below

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A, *infra*, pp. 17-23. The Memorandum and Order of the District Court, dated May 24,

1976, denying petitioner's application for approval of a supersedeas bond and for a stay of the April 2, 1976 Order of the District Court, is unreported and appears at Appendix B, *infra*, pp. 24-27.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit dismissing petitioner's appeal was entered on October 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Pursuant to several agreements to arbitrate, which required arbitration in accordance with the Rules of the American Arbitration Association, disputes between a public awarding authority, its general contractor and subcontractors were submitted to consolidated arbitration. Filed federal cases involving the various parties were stayed pursuant to the United States Arbitration Act pending the outcome of the consolidated arbitration. The arbitration hearings, which at the time of the decisions in the courts below had not yet been completed, have been extensive and have continued for over five years. A Federal District Court, concerned about the statistical "black eye" which these stayed federal cases were creating on its docket, issued an Order isolating one such case out of the consolidated arbitration and directing that a final award thereon be made within sixty (60) days of its Order, which time limitation plainly contravened the agreement between the parties and the Federal Arbitration Act. The arbitrators were not parties to the action nor were they in any way joined as parties before the District Court made the Order. This Order was not based on the Court's inherent power to control its docket or any federal statute. It was, rather, purportedly based on a procedural provision of state law.

The questions presented here relate to the appealability of such an order. Those questions are:

1. Whether the District Court's order was appealable as a final order under 28 U.S.C. § 1291 because it involved an important claim of right and issues fundamental to the further conduct of the case.

2. Whether the District Court's order was appealable as an interlocutory order modifying an injunction under 28 U.S.C. § 1292(a)(1).

3. Whether the District Court's order was appealable as an order granting an injunction under 28 U.S.C. § 1292(a)(1).

Statutory Provisions Involved

UNITED STATES CODE, TITLE 28

§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

§ 1292. Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court; . . .

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall

be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

UNITED STATES CODE, TITLE 9

§ 3. *Stay of proceedings where issue therein referable to arbitration*

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.
July 30, 1947, c. 392, 61 Stat. 670.

§ 4. *Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination*

... The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or

the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. . . .

§§ 1-14. Appear in full at Appendix C.

MASSACHUSETTS GENERAL LAWS, c. 149, § 29
appears in full at Appendix C.

MASSACHUSETTS GENERAL LAWS, c. 251, § 8(b)

. . .

(b) An award shall be made within the time fixed therefor by the agreement or, if said time is not so fixed, within such time as the court orders upon application of a party. The parties may by an agreement in writing extend the time either before or after the expiration thereof. A party shall be deemed to have waived the objection that an award was not made within the time required unless he notifies the arbitrators of his objection prior to the delivery of the award to him. Added St.1960, c. 374, § 1.

Statement

Introductory

The decision of the Court of Appeals concluded that the Court of Appeals was without jurisdiction to entertain petitioner's appeal from an Order, dated April 2, 1976, of the District Court which commanded that:

> "Upon application of Limbach Company, pursuant to Massachusetts General Laws c. 251, §8(b), it is hereby ordered than an award be made in the matter

of *Limbach Company* v. *Gevyn Construction Corporation,* American Arbitration Association No. 110-0060 (13)-70 within 60 days from the date of this Order."

In 1970, Middlesex County terminated the general contract of Gevyn Construction Corp. (hereinafter referred to as "Gevyn") to build a courthouse in Cambridge, Massachusetts, which contract contained an agreement to arbitrate. The subcontract of Limbach Company (hereinafter referred to as "Limbach"), which contained an agreement to arbitrate, was terminated as a result of the cancellation of Gevyn's general contract.

Gevyn, pursuant to its contract and Limbach's subcontract, commenced a consolidated abitration seeking damages from Middlesex County. It also sought indemnification from its subcontractors, including Limbach, with separate findings as to the rights of each of the subcontractor parties pertaining to all claims, including any by Limbach, flowing from the termination of the general contract.

In 1971, after the consolidated arbitration had been initiated, Limbach filed in Superior Court in Massachusetts a petition pursuant to Mass. Gen. Laws c. 149, §29 seeking to recover from Gevyn or its surety on the bond which that statute requires for the benefit of subcontractors. Gevyn removed the case to the District Court on the grounds of diversity of citizenship, and then moved that the proceeding be stayed pursuant to §3 of the Federal Arbitration Act pending the outcome of the consolidated arbitration. Gevyn's motion to stay the proceedings was allowed.

By early 1976 the arbitration proceedings which involved more than 20 parties, had resulted in 158 hearings with 3,000 exhibits and testimony from almost 100 witnesses. The hearings at the time of the decisions of the courts below had not yet been completed. At this point, the District Court called counsel in this case and other related sub-

contractor cases, then pending on its docket but stayed, before it for a "conference".

Basis For April 2, 1976 Order

The "conference" was held on February 9, 1976. The District Court began by expressing its acute concern with the effect of the stayed cases on its statistical record.

> "The Court: The purpose of this conference is to find out what, if anything, is ever going to happen to these cases. They have been pending since '70. We are now in '76. They are succeeding in giving this Court a very black eye, in terms of its statistical median time for the pendency of civil cases, which is a matter, unfortunately, that the Court gets rated on by great minds in Washington and elsewhere."

The conference concluded with a direction by the Court that counsel explore the possibility of some form of stipulation which might resolve the problem. Such an exploration was made to no avail and on March 15, 1976 another conference was held by the Court.

At the March 15, 1976, conference, counsel for Limbach submitted a "sample" form of Order Compelling An Immediate Award solely with respect to the Limbach portion of the consolidated and incomplete arbitration, pursuant to Massachusetts General Laws c. 251, §8b. Gevyn opposed the "sample" order, emphasizing that the benefits of the requested expedition were far outweighed by the confusion, prejudice and violations of previously agreed upon arbitration procedure that would result from such an order. Limbach itself recognized that no important policy of expedition would be served or resolved by the order in question when it stated to the Court:

"At the outset it should be pointed out that Limbach submitted the memorandum and sample order as a possible aid to the Court in its attempt to resolve the administrative problems occasioned by the long pendency of this action. Limbach did not submit a formal motion or application. If the Court were to leave the present stay of proceedings in effect and await a final award in the conglomerate arbitration, this would not entail denying any motion of Limbach's. Having agreed to the arbitration originally and having, for several years now, abided by the schedule, the timing of the hearings, and the various rulings of the Arbitrators on procedural matters, Limbach is fully reconciled to await the conclusion of that arbitration."

Nevertheless, the District Court entered the Order, as proposed, on April 2, 1976. Gevyn then submitted to the District Court a motion for reconsideration of, or, alternatively, amendment of the Order to include the statement prescribed by 28 U.S.C. §1292(b), which motion was denied.

Gevyn then filed a notice of appeal and an application for approval of supersedeas bond for stay of order pending appeal. This application was also denied by the District Court in the Memorandum and Order which appears in Appendix B, *infra*, pp. 24-27.

Limbach then submitted a motion to the Court of Appeals to dismiss Gevyn's appeal, which motion was denied, and the case was fully briefed and argued.

Reasons for Granting the Writ

The Court of Appeals has (i) decided an important question of federal law which has not been, but should be, directly settled by this Court, and (ii) has decided a federal

question in a way that contravenes the Federal Arbitration Act, 9 U.S.C. §1 et seq. and the concept of independent arbitration proceedings.

Insofar as the effect of the decision of the Court of Appeals has been to insulate federal trial courts from a full review with respect to their orders concerning the timing of arbitration awards, the decision will have great impact upon the role of the federal courts in all arbitrations in cases subject to federal jurisdiction.

I. The Role of the Courts Has Been to Enforce Arbitration Agreements and Not to Fashion Orders Which Fundamentally Interfere With the Conduct of the Arbitration Proceedings Pursuant to Rules Which the Parties Have Previously Agreed Upon.

The courts have consistently held that arbitration is a creature of contract between the parties, who have agreed to a specific method of resolving their disputes, and the role of the courts is simply to enforce the arbitration agreement made by the parties. In *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510, 519, (1974), this Court held, in part, as follows:

"The United States Arbitration Act, now 9 U.S.C. §§1 *et seq.*, reversing centuries of judicial hostility to arbitration agreements, was designed to allow parties to avoid 'the costliness and delays of litigation, and to place arbitration agreements upon the same footing as other contracts.'. . ."

• • • •

"An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute."

In *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400, 403, (1967), this Court held, in part, as follows:

> "The key statutory provisions are §§2, 3, and 4 of the United States Arbitration Act of 1925. . . . Section 3 requires a federal court in which suit has been brought 'upon any issue referable to abitration under an agreement in writing for such arbitration' to stay the court action pending arbitration once it is satisfied that the issue is arbitrable under the agreement. . . .
> "We hold, therefore, that in passing upon a §3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate. In so concluding, we not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts."

The instant case was stayed pending arbitration pursuant to a motion for stay that was expressly based upon Section 3, and it is submitted that such a stay was plainly necessitated by Section 3 since the United States Arbitration Act clearly applied in light of the facts.

What is significant here as a preliminary matter is that the United States Arbitration Act provided no warrant for the court order of April 2, 1976, directing a final award within 60 days. While the federal act is similar in some respects to the Massachusetts version of the Uniform Arbitration Act, it does not contain any provision similar to §8(b) of Massachusetts General Laws, Chapter 251, as amended, pursuant to which the District Court purported to make its Order. The only provisions in the federal act dealing with the timing of an award are 9 U.S.C. §10(e) and

§13(a), each of which address the question of the time within which the award was to be made in the context of *post*-award proceedings before the court. This rather clearly implies that the matter of the timing of the award is one which the court may concern itself only after the rendition of an award and the matter has been returned, so to speak, to the jurisdiction of the District Court.

Furthermore, the Order in question effectively directs the manner in which the parties are to arbitrate. It carves the Limbach arbitration claims out of the conglomerate and interdependent arbitration proceedings and orders separate treatment of them. It effectively directs that Limbach's claims be arbitrated in a manner inconsistent with the Construction Industry Rules of the American Arbitration Association which were part and parcel of Limbach's arbitration agreement. It effectively orders arbitration to "proceed" other than "in the manner provided for in such agreement" as mandated by §4 of the United States Arbitration Act.

There are, thus, grave doubts that the District Court had any authority under Massachusetts law or otherwise to make its unprecedented order of April 2, 1976 (doubts which the Court of Appeals failed to address), and what is most significant here is that the questions raised may never again be subject to effective appellate review. Indeed, if the Order is permitted to stand, Gevyn is exposed to the risk of inconsistent arbitration awards. There is the possibility that the arbitrators may make an award in favor of Limbach against Gevyn which, among other things, may not reflect the claims made by the County against Gevyn that Limbach's work as a subcontractor of Gevyn was defective or that Limbach's right to recovery, if any, is a vicarious one and conditioned first upon recovery by Gevyn from the County. If Limbach were to obtain a favorable award pursuant to the District Court's April 2, 1976, Order

it would likely be a blind, lump sum award without any explanation as to its rationale since "the AAA apparently discourages the practice of written arbitral opinions. . . ." *I/S Stavborg* v. *National Metal Converters, Inc.*, 500 F.2d 424, 429 (2nd Cir. 1974). Thus, Gevyn may be deprived of a coordinated, consistent result in the arbitration which it sought by its original Demand for Arbitration of the relative rights and liabilities of the various parties and which the arbitrators must have been attempting to achieve by refusing to close the hearings until all the evidence was concluded as to all parties to the multiparty, consolidated arbitration proceeding.

Under these circumstances, circumstances that are likely to reappear whenever complex and protracted arbitration proceedings arise in federal cases, it is submitted that the District Court's Order is appealable as a final order because it effectively disposes of an important claim of right "separable from, and collateral to" rights asserted in the main cause of action which may be lost if appellate consideration is delayed for a decision on the whole case, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-547 (1949); *Swift & Co. Packers* v. *Compania Columbiana Del Caribe*, 339 U.S. 684, 688-689 (1950).

II. The Decision of the Court of Appeals Dismissing the Appeal Clearly Frames Questions Concerning the Construction of 28 U.S.C. §1292(a) (1) Which Are, With Respect to Arbitration Proceedings in General, Currently Subject to Confusion and Conflict Among Various Courts of Appeal and Which Should be Settled by This Court.

As the interface between arbitrators and District Court judges becomes more pronounced with the increasing use of arbitration proceedings, it is vitally important to clearly establish the extent to which 28 U.S.C. §1292(a) (1) makes

orders of the District Court issued during the pendency of arbitration proceedings appealable interlocutory orders.

In this regard, it is submitted that the decision of the Court of Appeals that the Order of April 4, 1976 was not an appealable interlocutory under 28 U.S.C. 1292(a) (1) was erroneous in two respects.

First, it seems plain that the order in question clearly constitutes a modification of a prior injunction. In this regard, the Court of Appeals acknowledged that the original stay order constituted an injunction under 28 U.S.C. §1292(a)(1), (Appendix A, *infra*, p. 21), but it then held that the Order of April 2, 1976, which materially and substantially modified the injunction by directing that Limbach's claims be arbitrated in a manner inconsistent with Limbach's arbitration agreement and therefore the mandate of the United States Arbitration Act, did not amount to a modification under the statute. It is submitted that in light of the confusion and potential prejudice such an order creates and especially in light of the added expense and inconvenience, acknowledged by the Court of Appeals (Appendix A, *infra*, p. 20), which such a holding creates, this Court should formally rule on the matter.

Second, it seems plain that the Order of April 2, 1976 was in injunctive terms and in light of its intended coercive effect on the arbitrators, it must be construed to be an order granting an injunction within the meaning of 28 U.S.C. §1292(a) (1). This analysis is supported by the recent decision of the Supreme Court in *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289 (1975) in which the Court held that it had appellate jurisdiction under 28 U.S.C. §1253 (the language of which is substantially the same as that of 28 U.S.C. §1292(a) (1)) to review a District Court order to the I.C.C. as an order granting an injunction. In that case the Court said, 422 U.S. at 307-308:

"But the District Court's order not only declared that the ICC had failed to comply with NEPA, it also *directed* the ICC to perform certain acts. The order was plainly cast in injunctive terms. The order 'directs' the ICC to reopen *Ex parte* 281 and to conduct further proceedings which 'must' include preparation of an impact statement dealing with enumerated issues. In declining to restrain collection of the rates, the court said it was declining to grant 'to plaintiffs *additional* injunctive relief' (emphasis added). Were the order of the District Court left undisturbed, the ICC would hardly be free to decline to prepare a new impact statement or to conduct further proceedings. The order would have as coercive an effect on the ICC, its members, and its staff, as could any order of a district court in a proceeding to review an order of the court below within the meaning of the word 'injunction,' as used in §1253." (emphasis in original; footnote omitted.)

Similarly, the District Court's Order of April 2, 1976 purported to direct the arbitration tribunal to perform certain acts, i.e. to render an award as to Limbach and, perforce, to close and terminate the arbitration hearings with respect to Limbach's claim.

The classification of the District Court's Order of April 2, 1976 as an injunctive order is also supported by the case of *International Longshoremen's Association, Local 1291* v. *Philadelphia Marine Trade Association*, 389 U.S. 64 (1967) in which the Court held, at page 75, that a District Court decree ordering that an arbitrator's award "be specifically enforced" and ordering a union "to comply with and abide by the said Award" was an "order granting an injunction" for purposes of F.R. Civ. Pro. 65(d).

Conclusion

It is respectfully suggested that if the issues presented herein are allowed to remain unresolved, the validity of approximately thirty arbitration awards in the immediate case will be needlessly called into question and the propriety of countless future awards in different cases may well be subject to dispute whenever there is judicial interference in arbitration proceedings. Accordingly, and for the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

CORNELIUS J. MOYNIHAN, JR.
PEABODY, BROWN, ROWLEY & STOREY
One Boston Place
Boston, Massachusetts 02108
Tel. No. (617) 723-8700
Counsel for Petitioner

Of Counsel:
LESLIE A. HYNES
HYNES & DIAMOND
25 Broadway
New York, N. Y. 1004

January 18, 1977

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 76-1247.

LIMBACH COMPANY,
PLAINTIFF, APPELLEE,

v.

GEVYN CONSTRUCTION CORPORATION,
DEFENDANT, APPELLANT.

JUDGMENT

ENTERED October 20, 1976

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now ordered, adjudged and decreed as follows:

The appeal is dismissed. Costs to appellee.

By the Court:
DANA H. GALLUP
Clerk

[cc: Messrs. Moynihan and Fox]

United States Court of Appeals
For the First Circuit

No. 76-1247

LIMBACH COMPANY,
PLAINTIFF, APPELLEE,

v.

GEVYN CONSTRUCTION COMPANY,
DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. ANDREW A. CAFFREY, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
CLARK,* *Associate Justice, U.S. Supreme Court* (Ret.),
MCENTEE, *Circuit Judge*.

Cornelius J. Moynihan, Jr., with whom *Leslie A. Hynes, Hynes & Diamond*, and *Peabody, Brown, Rowley & Storey* were on brief, for appellant.

Francis H. Fox, with whom *James F. O'Brien* and *Bingham, Dana & Gould* were on brief, for appellee.

October 20, 1976

MCENTEE, *Circuit Judge*. In 1970 Middlesex County terminated the Gevyn Construction Corporation's contract to build a courthouse in Cambridge, Massachusetts. This case marks yet another step in the protracted litigation stemming from that event.[1]

After the County's action, Gevyn, the general contractor, sucessfully demanded arbitration of all claims flowing

* Sitting by designation

[1] *E.g., Pioneer Industries* v. *Gevyn Construction Corp.*, 458 F.2d 582 (1st Cir. 1972); *County of Middlesex* v. *Gevyn Construction Corp.*, 450 F.2d 53 (1st Cir.), *cert. denied*, 405 U.S. 955 (1972).

from the contract termination.[2] In addition to Gevyn, parties to the consolidated arbitration proceeding were the County, which Gevyn accused of wrongful breach, and Gevyn's subcontractors, including appellee Limbach Company. Limbach sought damages for breach of its subcontract which was terminated as a result of the cancellation of the principal contract. Gevyn claimed damages from the County; alternatively, in the event Gevyn were held liable to the County, Gevyn sought indemnification from its subcontractors.

In 1971, after arbitration had begun, Limbach sued Gevyn in Superior Court in Massachusetts to preserve its claim under Mass. Gen. Laws c. 149, §29. Limbach filed a "petition in equity" seeking to recover from Gevyn or its surety on the bond which that statute requires for the benefit of subcontractors. Gevyn removed the case to the district court on grounds of diversity of citizenship, and the proceeding was stayed pending the outcome of the consolidated arbitration.

By early 1976 the arbitration hearings had not been completed.[3] The district court summoned the attorneys for all parties to suits that had been stayed pending the outcome of the consolidated arbitration to explore ways of removing the cases from the court's docket. The judge expressed concern that the cases had continued on the docket for so long, stating that they were "giving this Court a very black eye, in terms of its statistical median time for the pendency of civil cases...." While other

[2] In 1971, this court affirmed the district court's stay of judicial proceedings and order that the County submit to arbitration. *County of Middlesex* v. *Gevyn Construction Corp., supra.*

[3] The record indicates that "there have been conducted 158 hearings, there is a stenographic transcript of over 35,000 pages and in excess of 3,000 exhibits have been received and testimony of almost 100 witnesses have been heard by the Arbitrators in this case involving over 20 parties."

litigants were able to agree on some method for disposing of their cases, Limbach and Gevyn were not. After a fruitless exploration of possibilities such as a stipulated dismissal without prejudice or an agreed remand to state court, the judge on April 2, 1976 ordered that an award be entered as to Limbach's claim in the consolidated arbitration proceeding within 60 days.[4] This appeal followed.

Appellant Gevyn challenges the propriety of the judge's order, on various grounds. At this time, however, we need not reach the merits, for we conclude that we are without jurisdiction to entertain this appeal.

The jurisdictional bases for this appeal are to be found, if at all, in 28 U.S.C. §§1291, 1292. Under §1291, this court may review only "final decisions" of the district court. And, §1292(a)(1) confers jurisdiction for appeals from "[i]nterlocutory orders of the district court ... granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. . . ."

In this case the order of the district court requiring the prompt conclusion of arbitration of the Gevyn-Limbach portion of the courthouse claims does not terminate the litigation and therefore is not a "final decision" within the traditional meaning of that term. *E.g., Baetjer* v. *Garzot Fernandez,* 329 F.2d 798 (1st Cir. 1964). The source of this litigation, Limbach's action under Mass. Gen. Laws c. 149, §29, which was stayed pending arbitration, will not be concluded until the accelerated arbitration has resolved Limbach's claim against Gevyn and the court has disposed of the stayed judicial proceeding.

Having determined that the order in this case is interlocutory in nature, we must consider whether it disposes of an independent or collateral claim of right which

[4] At the time of oral argument, we were informed that no award had yet been made.

will evade review if not immediately appealable. *New England Power Co.* v. *Asiatic Petroleum Corp.*, 456 F.2d 183, 185 (1st Cir. 1972) *See Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949); 9 J. Moore, Federal Practice ¶110.10, at 133 (2d ed. 1975). Appellant Gevyn asserts that this case fits within the *Cohen* exception since the district court's order exposes Gevyn to the "risk of inconsistent arbitration awards." Gevyn evidently fears that the arbitrators, if they are required to rule at an early stage on Limbach's claim for the balance due for its services, will fail to include this early ruling in their calculations when making an award on Gevyn's counterclaim for indemnification. Gevyn's fears in this regard are heightened by the allegedly common practice of arbitrators to enter lump-sum awards without written explanation.

Assuming that Gevyn's fears are well-founded, we do not believe that the assertedly prejudicial impact of the district judge's order of April 2 will escape our review if enforcement by the court of an unfavorable arbitral award is ultimately appealed. Rather, it seems clear to us that Gevyn's ability to assert the alleged error of the April 2 order will not be vitiated at all by requiring appellant to await appeal of a final decision. It may well be that the error asserted by Gevyn will be insufficiently prejudicial to defeat enforcement of an arbitral award, an assumption on which we intimate no opinion. *See generally,* 5 Am. Jur. 2d "Arbitration and Award," §§163, 167 (1962). The insufficiency of the defense in such a case, however, would result, not from the timing of Gevyn's appeal, but from the standard of review to be applied uniformly to arbitral awards.

As a result of our failure to entertain this appeal on the merits, Gevyn will be put to the added expense and inconvenience of seeing to its end an arbitral proceeding

which Gevyn asserts was fatally infected by error at an early stage. This unfortunate consequence does not bring the case within the *Cohen* exception to §1291, however. Rather, this is the price which litigants must pay if the federal judicial system is to be protected from piecemeal appeals from the erroneous interlocutory orders, even those which ultimately result in reversible error. *See New England Power Co.* v. *Asiatic Petroleum Corp., supra.* The wisdom of the policy requiring litigants to defer appeals until the end of the case is particularly clear in this case where the ultimate effect of the trial judge's unusual order is largely, speculative, suggesting that the hindsight is the better tool for examining its allegedly prejudicial impact.[5]

Gevyn asserts in the alternative that the 1971 stay of judicial proceedings was an "injunction" within the meaning of §1292(a)(1) and that the district judge's order of April 2 was a "modification" of that injunction and therefore appealable under §1292(a)(1). We agree with appellant's characterization of the 1971 stay.[6] However, we do

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[5] Gevyn cites a recent second circuit case. *Compania Espanola de Petroleos* v. *Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), *cert. denied* ___ U.S. ___ (June 14, 1976), for the proposition that an order directing the manner of arbitration is appealable. We are not convinced that the second circuit so held. The court in *Compania Espanola* was faced with "a mass of confusion and procedural effluvia," 527 F.2d at 968, that makes it difficult to determine exactly what kind of an order was appealed, but the opinion indicates that the court was moved to consider the order not because it mandated the procedural step of consolidation, but because it "obligated the parties to arbitrate, thereby affecting substantive rights." *Id.* at 973. In any event, this circuit's position on the appealability of orders affecting the right or duty to arbitrate is set forth in *New England Power Co.* v. *Asiatic Petroleum Corp.*, 456 F.2d 183 (1st Cir. 1972). The reasoning of that case indicates that an order affecting the manner of arbitration is not appealable.

[6] At first blush the 1971 stay might appear more properly to be termed an exercise by the district court of control of its own docket than an "injunction." However, for purposes of determining appealability under § 1292(a)(1) of stays of proceedings, the

not agree that the 1976 order can be said to have "modified" the earlier decree.

It is true that the judge's order of April 2, 1976 is related to the 1971 stay in the sense that both affect the progress of the same case. And the speedy arbitration ordered in 1976 will presumably result in an earlier dissolution of the 1971 stay than would otherwise be the case. However, this interrelationship of the two orders is too attenuated for the 1976 order to be termed a "modification" of the 1971 stay. The 1971 order remains in

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fiction persists that law courts and equity courts retain separate identities. *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 184-85 (1955); *New England Power Co.* v. *Asiatic Petroleum Corp.*, 456 F.2d 183, 189 (1st Cir. 1972). Where a court stays proceedings at law to permit the progress of another action at law, the law/equity distinction does not come into play, for the action is viewed simply as a court's control of its own docket. Since the stay in such a case is not equitable in origin, the order is not regarded as an injunction. *See Enelow* v. *New York Life Insurance Co.*, 293 U.S. 379, 381-82 (1935). Where, however, a court stays an action "at law" in order to hear an equitable defense or counterclaim, the stay is viewed as akin to the *in personam* injunction of an equity court prohibiting a litigant from pursuing an action in a law court. *See Baltimore Contractors, Inc. v. Bodinger, supra* at 182-84; *Ettelson* v. *Metropolitan Life Ins. Co.*, 317 U.S. 188, 191-92 (1942); *Enelow* v. *New York Life Ins. Co.*, *supra* at 382.

In this case the action stayed by the 1971 order was "at law." To be sure, the Massachusetts statute creating the action sued upon calls for it to be brought "in equity" in Massachusetts courts. However, once the case is removed to federal court, the nomenclature of the action is determined by federal law. *Warren Bros. Co.* v. *Cardi Corp.*, 471 F.2d 1304, 1306 (1st Cir. 1973); *Kirschner* v. *West Co.*, 300 F.2d 133, 134 (3d Cir. 1962) (en banc.). *See Stern* v. *South Chester Tube Co.*, 390 U.S. 606, 610 (1968); *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 105-07 (1945). An action under Mass. Gen. Laws c. 149, § 29, seeking money damages from the principal or its surety is characterized for purposes of federal law as "at law." *See Warren Bros. Co.* v. *Cardi, supra.* When such an action at law is stayed to permit arbitration to proceed, the order is characterized as an injunction for purposes of § 1292. *Baltimore Contractors, Inc.* v. *Bodinger, supra* at 184. *See generally* Annot., 11 A.L.R. Fed. 640 (1972).

full force and effect and it cannot be said to have been modified until its explicit terms have been changed.

Appellant next argues that if the order of April 2 is not a "modification" of an injunction, it is an "interlocutory order . . . *granting* . . . an injunction" within the meaning of §1292(a)(1). (Emphasis supplied.) The Supreme Court has narrowly defined the class of "interlocutory" injunctions, the granting of which may be appealed. The Court has read into §1292(a)(1) a requirement that the injunction dispose of a substantive issue:

> "Orders that in no way touch on the merits of the claim but only relate to pretrial procedures are not in our view 'interlocutory' within the meaning of §1292(a)(1)."

Switzerland Cheese Ass'n v. *E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966). *See also International Products Corp.* v. *Koons*, 325 F.2d 403, 406 (2d Cir. 1963); 9 J. Moore, Federal Practice ¶110.20[1] (2d ed. 1975). *Cf. Cohen* v. *Benifical Indus. Loan Corp., supra.* The order in this case does not touch the merits of any claim of right. Rather, we believe, it relates only to "pretrial procedures" and is therefore not an "interlocutory order... granting ... an injunction" within the meaning of §1292 (a)(1). *Switzerland Cheese Ass'n* v. *E. Horne's Market, Inc., supra.*

For these reasons we conclude that we have no jurisdiction to entertain this appeal.

Appeal dismissed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. No. 71-342F

LIMBACH CO. AND
POWERS REGULATOR CO.
v.
GEVYN CONSTRUCTION CORP. AND
THE TRAVELERS INDEMNITY CO.

MEMORANDUM AND ORDER
May 24, 1976

CAFFREY, CH.J.

This matter arises on an application of the Gevyn Construction Corp. (Gevyn) pursuant to Rule 8(a), F.R.A.P. and Rule 62(d), F.R. Civ. P., for approval of a supersedeas bond and for a stay of an order of this Court pending an appeal by Gevyn to the Court of Appeals. For the reasons hereinafter articulated the application for approval of the bond and for a stay is denied.

This case is merely one of eleven cases presently pending before this Court involving the disputes arising from construction of the Middlesex County Courthouse (the Courthouse). This action was originally brought by the Limbach Company (Limbach), a subcontractor in the Courthouse project, in Suffolk Superior Court against Gevyn, the general contractor, in which Limbach sought payment for labor and materials furnished by it in the construction of the Courthouse pursuant to a contract executed about nine years ago between Limbach and Gevyn, dated November 6, 1967. Defendants subsequently removed this action to this Court on the basis of diversity of citizenship.

Arbitration in the Courthouse litigation commenced on May 28, 1970. On May 4, 1972 this Court ordered a stay in the *Limbach* case pending the completion of arbitration. By agreement of the parties, Limbach's claim was consolidated for hearing in arbitration with the claims of the other sub-contractors of Gevyn, and the claims of Gevyn against Middlesex County, the owner of the project. After nearly five years of arbitration Limbach moved in March 1976 for an order of this Court compelling an immediate award in its case against Gevyn. Affidavits in support of the motion and opposition thereto were filed by both parties and the matter was briefed and argued. On April 2, 1976 this Court entered an order compelling the arbitrators to make an award in the matter of *Limbach Co.* v. *Gevyn Construction Corp.*, American Arbitration Association No. 11-0-0069 (13)-70 within 60 days.

The Court based its order on M.G.L. c. 149, § 29 which provides that a subcontractor may bring suit against its general contractor and the general contractor's bonding company to enforce its claims for labor and materials furnished to a general contractor for the construction of a public building. The statutory purpose of this section is to afford subcontractors such as Limbach an *EXPEDITIOUS* resolution of their claims against general contractors. *Warren Bros.* v. *Cardi*, 471 F.2d 1304 (1 Cir. 1973). The Court looked to state law on the basis of the principles enunciated in *Erie* v. *Tompkins*, 304 U.S. 64 (1938) directing that a federal court sitting in diversity should apply the substantive law of the state, and may not act in derogation of rights of the parties as conferred by the state. *Bernhardt* v. *Polygraphic Co. of America, Inc.*, 350 U.S. 198, 203 (1956).

On April 13, 1976, Gevyn moved for reconsideration of the Court's April 2, 1976 order or, in the alternative, for an amendment of that order to include a statement under

28 U.S.C.A. § 1292(b) which would have allowed an appeal of an otherwise unappealable order. On May 10, 1976 the Court denied Gevyn's motion for reconsideration and declined to amend its April 2, 1976 order pursuant to 28 U.S.C.A. § 1292(b).

The defendant Gevyn now moves under Rule 8(a), F.R.A.P. and Rule 62(d), F.R. Civ. P. for a stay of the April 2, 1976 order of this Court pending an appeal. Pursuant to the direction of the United States Supreme Court in *Virginia Ry.* v. *U. S.*, 272 U.S. 658 (1926) (see also 9 Moore, Federal Practice, ¶ 208.07, p. 1424) the Court states the following as its reasons for denying the instant application:

1. The consolidation of subcontractor's claims was to facilitate the taking of evidence before the arbitrators. Claims by individual subcontractors, nonetheless, retain their separate character and require the entry of separate awards;

2. All, or virtually all, evidence with respect to the claim of Limbach and Gevyn's defenses thereto have been presented to the arbitrators and thus Limbach's claim is ripe for decision and award within the time ordered by this Court;

3. The incomplete state of the evidence in the claims of Gevyn against Middlesex County and the County's counterclaim against Gevyn is not a compelling reason to further delay a resolution of Limbach's 5 year old claim against Gevyn, see *A. J. Wolfe* v. *Baltimore Contractors*, 355 Mass. 361 (1969);

4. There is no controlling question of law as to which there is a substantial difference of opinion;

5. An immediate appeal from the April 2, 1976 order compelling an arbitration award will not materially advance the ultimate termination of this litigation but will,

on the contrary, further delay these already protracted proceedings;

6. This Court's April 2, 1976 order compelling an arbitration award is not an appealable order; and,

7. There is a policy in the federal courts of long standing duration, grounded in sound logic, against piecemeal appeals. *Switzerland Cheese Ass'n, Inc.* v. *E. Horne's Market, Inc.*, 385 U.S. 1041 (1966); *In re Sylvania Elec. Products*, 220 F.2d 423 (1 Cir. 1955).

Accordingly, the application for approval of a supersedeas bond and for a stay of the April 2, 1976 order is denied.

s/ ANDREW A. CAFFREY
Andrew A. Caffrey, Ch.J.

APPENDIX C

U.S. CODE, TITLE 9

(UNITED STATES ARBITRATION ACT, CHAPTER 1)

§ 1. *"Maritime transactions" and "commerce" defined; exceptions to operation of title*

"Maritime transactions", as herein defined means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.
July 30, 1947, c. 392, 61 Stat. 670.

§ 2. *Validity, irrevocability, and enforcement of agreements to arbitrate*

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.
July 30, 1947, c. 392, 61 Stat. 670.

§ 3. *Stay of proceedings where issue therein referable to arbitration*

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.
July 30, 1947, c. 392, 61 Stat. 670.

§ 4. *Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination*

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and

proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.
July 30, 1947, c. 392, 61 Stat. 671;
Sept. 3, 1954, c. 1263, § 19, 68 Stat. 1233.

§ 5. *Appointment of arbitrators or umpire*

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party

to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.
July 30, 1947, c. 392, 61 Stat. 671.

§ 6. *Application heard as motion*

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.
July 30, 1947, c. 392, 61 Stat. 671.

§ 7. *Witnesses before arbitrators; fees; compelling attendance*

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator

or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.
July 30, 1947, c. 392, 61 Stat. 672;
Oct. 31, 1951, c. 655, § 14, 65 Stat. 715.

§ 8. *Proceedings begun by libel in admiralty and seizure of vessel or property*

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.
July 30, 1947, c. 392, 61 Stat. 672.

§ 9. *Award of arbitrators; confirmation; jurisdiction; procedure*

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and there-

upon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.
July 30, 1947; c. 392, 61 Stat. 672.

§ 10. *Same; vacation; grounds; rehearing*

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.
July 30, 1947, c. 392, 61 Stat. 672.

§ 11. *Same; modification or correction; grounds; order*

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

July 30, 1947, c. 392, 61 Stat. 673.

§ 12. *Notice of motions to vacate or modify; service; stay of proceedings*

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other processes of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the

notice of motion, staying the proceedings of the adverse party to enforce the award.

July 30, 1947, c. 392, 61 Stat. 673.

§ 13. *Papers filed with order on motions; judgment; docketing; force and effect; enforcement*

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

July 30, 1947, c. 392, 61 Stat. 673.

§ 14. *Contracts not affected*

This title shall not apply to contracts made prior to January 1, 1926.

July 30, 1947, c. 392, 61 Stat. 673.

MASSACHUSETTS STATUTE

MASSACHUSETTS GENERAL LAWS c. 149, §29

Officers or agents contracting in behalf of the commonwealth or in behalf of any county, city, town, district or other potential political subdivision of the commonwealth or other instrumentality for the construction, reconstruction, alteration, remodeling, repair or demolition of public buildings or other public works when the amount of the contract in the case of the commonwealth is more than five thousand dollars, and in any other case is more than two thousand dollars, shall obtain security bond in an amount not less than one half of the total contract price, for payment by the contractor and subcontractors for labor performed or furnished and materials used or employed therein, including lumber so employed which is not incorporated therein and is not wholly or necessarily consumed or made so worthless as to lose its identity, but only to the extent of its purchase price less its fair salvage value, and including also any material specially fabricated at the order of the contractor or subcontractor for use as a component part of said public building or other public work so as to be unsuitable for use elsewhere, even though such material has not been delivered and incorporated into the public building or public work, but only to the extent of its purchase price less its fair salvage value and only to the extent that such specially fabricated material is in conformity with the contract, plans and specifications or any changes therein duly made; for payment of transportation charges for materials used or employed therein which are consigned to the contractor or to a subcontractor who has a direct contractural relationship with the contractor; for payment by such contractor and subcontractors of any sums due for the rental or hire of vehicles, steam shovels, rollers propelled by steam or other power, concrete mixers, tools

and other appliances and equipment employed in such construction, reconstruction, alteration, remodeling, repair or demolition; for payment of transportation charges directly related to such rental or hire; and for payment by such contractor and subcontractors of any sums due trustees or other persons authorized to collect such payments from the contractor or subcontractor, based upon the labor performed or furnished as aforesaid, for health and welfare plans, supplementary unemployment benefit plans and other fringe benefits which are payable in cash and provided for in collective bargaining agreements between organized labor and the contractor or subcontractors; provided, that any such trustees or other persons authorized to collect such payments for health and welfare plans, supplementary unemployment benefit plans and other fringe benefits shall, subject to the following provisions, be entitled to the benefit of the security only in an amount based upon labor performed or furnished as aforesaid for a maximum of one hundred and twenty consecutive calendar days.

In order to obtain the benefit of such security the claimant shall file, with the county treasurer in the case of a contract with a county, with the city or town clerk in the case of a contract with a city or town, and with the contracting officer or agent in the case of a contract with the commonwealth, a district or other political subdivision or other public instrumentality, a sworn statement of his claim prior to the expiration of ninety days after the claimant ceases to perform labor or furnish labor, materials, appliances and equipment or transportation as aforesaid, for which claim is made, and for payments due health and welfare plans, supplementary unemployment benefit plans and other fringe benefits, prior to the expiration of ninety days after the date of the furnishing of the last of the labor for which such payments are made and claimed, and for specially fabricated material prior to the expiration of ninety days

after delivery, or if delivery is refused by the contractor or subcontractor prior to the expiration of ninety days after the date of such refusal; provided, that no such claim shall be valid for specially fabricated material ordered by a subcontractor unless written notice of the placement of the order and the amount thereof has been given to the contractor principal on the bond within twenty days after such placement; and provided, that no such claim shall be valid for transportation charges, other than demurrage charges, unless written notice of the amount of the claim has been given to the contractor principal on the bond within twenty days after the date of delivery of the materials, appliances or equipment, and in the case of demurrage charges, unless written notice of the amount of the claim has been given to the contractor principal on the bond within sixty-three days after the date of release of the transportation equipment; and if such claim is not paid or satisfied, shall file, within one year after the filing of such claim, a petition in equity in the superior court for the proper county to enforce his claim or intervene in a petition already filed.

After the filing of any such petition, a claimant may move for a decree on his claim in accordance with the procedure set forth in section fifty-nine and in section fifty-nine B of chapter two hundred and thirty-one. On motion of any party, the court shall advance such petition for speedy trial. Before making final disposition of such petition, the court may examine all claims which may arise under this section and which have been duly filed in accordance herewith, and determine the respective amounts due such claimants and their right to participate in the security and apply the security to the claimants held entitled thereto.

Any claimant whose claim has been duly filed shall have the right to appear at hearings on any petition without formally intervening by any pleadings, and may object,

except or appeal from any ruling or decision adversely affecting his claim to the same extent and in the same manner as though he had intervened by formal pleadings. A copy of a sworn statement of claim filed pursuant to this section, authenticated by a certificate of the official having custody thereof that such copy is a true copy of a sworn statement of claim filed on a date specified with a board or officer named, shall be admissible as evidence of such sworn statement of claim and of the filing thereof.

Any person employing persons on any public works hereinbefore referred to shall post conspicuously, at such place or places as will provide reasonable opportunity for all employees to read the same, a correct copy of this section. The department shall enforce this paragraph.

Amended by St. 1935, c. 217, § 2; St. 1935, c. 472,§ 2; St. 1938, c. 361; St. 1955, c. 702, § 2; St. 1957, c. 682, § 1; St.1962, c. 696; St.1964, c. 609, §§ 4, 5.